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Nos. 06-969 and 06-970

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT

v.

WISCONSIN RIGHT TO LIFE, INC.

SENATOR JOHN MCCAIN, ET AL., APPELLANTS

v.

WISCONSIN RIGHT TO LIFE, INC.

ON APPEALS
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

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QUESTIONS PRESENTED

1. Whether this case is moot.

2. Whether the three-judge district court erred in holding that the federal statutory prohibition on a corporation's use of general treasury funds to finance "electioneering communications" is unconstitutional as applied to three broadcast advertisements that appellee proposed to run in 2004.

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OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-48a) is not yet reported.[1] Prior opinions of the district court (J.S. App. 55a-56a, 57a-71a) are unreported.

[1] Unless otherwise noted, references to "J.S. App." are to the appendix to the jurisdictional statement in No. 06-969.

JURISDICTION

The decision of the three-judge district court was issued on December 21, 2006. On December 28, 2006, the district court issued an order stating that the December 21 order was "a final appealable order as to those issues decided in the opinion accompanying that order," and that there was "no just reason to delay an appeal." J.S. App. 51a. Notices of appeal were filed on December 29, 2006, by the Federal Election Commission (J.S. App. 53a-54a) and by the intervenor defendants (appellants in No. 06-970) (06-970 J.S. App. 42a-43a). The jurisdictional statements were filed on January 12, 2007. On January 19, 2007, this Court consolidated the two appeals and set the case for briefing and argument, while postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114. As discussed below, while this Court has statutory jurisdiction to entertain the instant appeals, the district court lacked Article III jurisdiction to adjudicate appellee's claims because the controversy giving rise to this action is moot.

STATEMENT

This case concerns the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91 (2 U.S.C. 441b(b)(2) (Supp. IV 2004)), which prohibits corporations, labor unions, and national banks from using their general treasury funds to pay for any "electioneering communication." The term "electioneering communication" is defined as a communication that refers to a candidate for federal office and is broadcast within the 30 days before a federal primary election or the 60 days before a federal general election in the jurisdiction in which that candidate is running. BCRA § 201(a), 116 Stat. 89 (2

U.S.C. 434(f)(3)(B)(i) (Supp. IV 2004). In *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003), this Court sustained the constitutionality of BCRA § 203 against a facial challenge.

Appellee filed suit in federal district court, arguing that BCRA's restrictions on the financing of "electioneering communications" are unconstitutional as applied to three broadcast advertisements that appellee had proposed to run in 2004. The three-judge district court concluded that appellee's claim was foreclosed by *McConnell* and accordingly dismissed the complaint. J.S. App. 55a-56a; see *id.* at 57a-71a. This Court reversed, clarifying that BCRA § 203 is subject to as-applied challenges. See *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016, 1018 (2006) (*WRTL I*) (per curiam). On remand, the district court held by a divided decision that BCRA § 203 is unconstitutional as applied to the 2004 advertisements and granted summary judgment to appellee. J.S. App. 1a-48a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(d); 2 U.S.C. 438(a)(8) (Supp. IV 2004); and to issue written advisory opinions concerning the application of the FECA and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited all corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation what-

ever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (Supp. IV 2004). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may solicit and accept donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to candidates for federal office, and it may be used without limitation to pay for independent expenditures to communicate to the general public the corporation's views on such candidates.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court held that Section 441b's prohibition on the use of corporate treasury funds to finance independent expenditures for campaign-related speech could not constitutionally be applied to a corporation that (1) was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210-211; 11 C.F.R. 114.10 (implementing the *MCFL* exception); see also *Beaumont*, 539 U.S. at 152-162 (upholding ban on direct corporate contributions as ap-

plied to all corporations, including those meeting the three *MCFL* criteria). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. In interpreting Section 441b's prohibition of corporate "expenditure[s]," the Court noted that the FECA definition of "expenditure" encompassed "the provision of anything of value made 'for the purpose of influencing any election for Federal office.'" *MCFL*, 479 U.S. at 245-246 (quoting 2 U.S.C. 431(9)(A)(i)) (emphasis omitted). To avoid vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 248-249; see 2 U.S.C. 431(17) (pre-BCRA law). The Court had previously introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976) (per curiam), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52.

b. Based on its assessment of evolving federal campaign practices following numerous hearings, Congress subsequently determined that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126. In the wake of *Buckley*, corporations and labor unions crafted political communications that avoided the so-called magic words of electoral advocacy and financed those communications with "hundreds of millions of dollars" from their general treasur-

ies. *Id.* at 127. Indeed, even the advertisements aired by federal candidates themselves, who had no regulatory incentive to avoid the words of express advocacy, rarely included express exhortations to vote for or against a particular candidate. See *id.* at 127 & n.18, 193 & n.77. "[T]he conclusion that [corporate and union] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation, union, or national bank from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (Supp. IV 2004). The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 89 (2 U.S.C. 434(f)(3)(A)(i) (Supp. IV 2004)).[2] The prohibition on the use of corporate funds for electioneering communications does not apply to "*MCFL* organizations." See *McConnell*, 540

[2] BCRA excludes from the definition of "electioneering communication" "(i) a communication appearing in a news story, commentary, or editorial distributed through" a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), 116 Stat. 89 (2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. IV 2004)). The definition also does not encompass print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or internet communications. See *McConnell*, 540 U.S. at 207.

U.S. at 209-211. A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for electioneering communications in unlimited amounts from that fund. See 2 U.S.C. 441b(b)(2)(C) (Supp. IV 2004).

3. Three Terms ago, in *McConnell*, this Court upheld against a facial constitutional challenge BCRA § 203's ban on the use of corporate or union treasury funds for electioneering communications. See 540 U.S. at 203-209. The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *Id.* at 204 (quoting *Beaumont*, 539 U.S. at 162); see *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 163). The Court also noted that its campaign-finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citation and internal quotation marks omitted).

The Court in *McConnell* further held that the compelling governmental interests that support the requirement that corporations finance express advocacy through a PAC apply equally to corporate financing of electioneering communications. 540 U.S. at 206. Based on its examination of a voluminous record, the Court concluded that the "vast majority" of prior advertisements encompassed by BCRA's definition of the term "electioneering communications" were intended to influence elections. *Ibid.* The Court further observed that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine

issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.*

4. a. Appellee Wisconsin Right To Life, Inc., is a nonprofit, nonstock Wisconsin corporation. J.S. App. 2a. Appellee's amended complaint in this case asserted that the corporation is tax-exempt under Section 501(c)(4) of the Internal Revenue Code of 1986 (26 U.S.C.), and that it was organized to protect "individual human life from the time of fertilization until natural death." Amended Compl. paras. 20, 22; see J.S. App. 57a. Appellee asserted that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation" under 11 C.F.R. 114.10, which implements the *MCFL* exception. See J.S. App. 3a n.2, 58a. In 2004, appellee raised more than $300,000—approximately one-fourth of the annual revenues of its general fund—from corporations, with the "vast majority" coming from business corporations. FEC Exh. 3, at 147-151; see J.A. 119-120. Appellee maintains a PAC for election-related activity. J.S. App. 58a.

b. United States Senator Russell Feingold of Wisconsin, a Democrat, ran for reelection in 2004. J.S. App. 58a. In both 1992 and 1998, appellee's PAC had made independent expenditures urging Senator Feingold's defeat. See FEC Exhs. 11-12. "In March 2004, [appellee's] PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority." J.S. App. 58a. Later that month, appellee itself issued a press release that emphasized the organization's "resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!" J.A. 80. The lead story in the Spring 2004 issue of appellee's quarterly magazine was entitled "RADICALLY PRO-ABORTION FEINGOLD MUST GO!" (J.A. 101) and

stated that "Russ Feingold is so extreme in his anti-life position and the U.S. Senate is so important to the future of unborn babies that the defeat of Feingold must be uppermost in the minds of Wisconsin's pro-life community in the 2004 elections!" (J.A. 103). In August or September of 2004, appellee's PAC paid for radio advertising that called explicitly for Senator Feingold's defeat. See FEC Exh. 3, at 128-131; FEC Exh. 4, at 126-127.

Appellee, along with others acutely interested in the upcoming election, identified Senator Feingold's participation in filibusters of judicial nominees as a principal reason for opposing his reelection. The lead story in the Spring 2004 issue of appellee's magazine stated that "a number of President Bush's federal judicial nominees have been blocked by Bush's opponents from receiving a vote by the full Senate," and that "Feingold has been active in his opposition to Bush's judicial nominees and is expected to be particularly active in opposition to U.S. Supreme Court nominees." J.A. 101, 102. The lead story in the next issue was entitled "Nothing More Important: Re-Electing Pro-Life President Bush and Defeating Pro-Abortion Russ Feingold." J.A. 106. With respect to the Wisconsin Senate race, the story stated:

> The U.S. Senate is responsible for voting to confirm or reject the President's judicial nominees. One of Wisconsin's current U.S. Senators, pro-abortion Russ Feingold, faces re-election in the 2004 elections. Feingold has done everything he can to thwart a number of the President's federal judicial nominees at lower court levels and this is only a preview of what Feingold and others would do to defeat President Bush's nominees to the U.S. Supreme Court. The right-to-life community in Wisconsin must do all it can to defeat Feingold and replace him with an indi-

> vidual who will consider President Bush's judicial nominees in a fair manner.

J.A. 107. The article further explained that appellee's PAC had "endorsed three pro-life Republican U.S. Senate candidates," and that "all three candidates pledged to allow a vote by the full Senate on judicial nominees that have received either a favorable or neutral rating by the Senate Judiciary Committee." J.A. 108-109. In addition, the Republican Party of Wisconsin identified Senator Feingold's "obstruction of President Bush's judicial nominees" as one of four reasons "why Russ Feingold should be voted out of office." FEC Exh. 18, at 2; see J.A. 19.

c. "In a news release on July 14, 2004, [appellee] criticized Senator Feingold's record on Senate filibusters against judicial nominees." J.S. App. 58a; see J.A. 86-87. Less than two weeks later, near the beginning of a long congressional recess, appellee began to use its corporate treasury funds to finance the airing of two radio advertisements and one television advertisement that were critical of the filibusters. J.S. App. 3a-6a, 60a; see *id.* at 66a-71a (text of advertisements). Those advertisements characterized filibusters of judicial nominees as "politics at work, causing gridlock and backing up some of our courts to a state of emergency." *Id.* at 67a, 69a; see *id.* at 70a (television advertisement states that "[i]t's politics at work and it's causing gridlock"). Each advertisement stated: "Contact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.* at 67a, 69a, 70a-71a. Senator Kohl was not a candidate for reelection in 2004. *Id.* at 24a.

None of the advertisements provided contact information for Senator Feingold or Senator Kohl. Each advertisement, however, explicitly urged listeners or viewers to visit "BeFair.org," a website that appellee had created for its 2004 advertising campaigns. See J.S. App. 67a, 69a, 71a. That website contained links to appellee's main website, and both

sites contained numerous materials criticizing Senator Feingold on the filibuster issue. See, *e.g.*, J.A. 77-92, 100-109, 123-128. For example, one "e-alert" posted on "BeFair.org" stated that "16 out of 16 times over the past two years, Feingold and Kohl have voted to filibuster certain of the President's nominees," and that "Feingold and Kohl are putting politics into the court system, creating gridlock, and costing taxpayers money." J.A. 86. Between five and ten business corporations, some from outside Wisconsin, donated a total of more than $50,000 specifically to finance the advertisements. See FEC Exh. 3, at 143-145, 150.

The two radio advertisements first aired on July 26, 2004, and the television advertisement first aired on August 2, 2004. See FEC Exh. 3, at 65. The advertisements began to run a few days after four judicial filibuster votes had occurred and the Senate had departed for a six-week recess. See J.S. App. 43a (Roberts, J., dissenting); FEC Exh. 35, at 4; *Days in Session Calendars U.S. Senate—108th Congress 2nd Session* (2004) <http://thomas.loc.gov/home/ds/s1082.html>; J.A. 61. No judicial filibuster votes occurred during the rest of 2004. See FEC Exh. 35.[3]

5. On July 28, 2004, appellee filed suit against the FEC in federal district court, alleging that BCRA's prohibition on the use of corporate treasury funds for "electioneering communications" as defined in the Act is unconstitutional as applied to the three specific broadcast advertisements and to any "ma-

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[3] Evidence obtained through discovery in this case indicated that appellee had entered into discussions with an advertising agency in early to mid-May but had intended from the outset to air the advertisements during the BCRA pre-election period, even though the agency was generally capable of creating a radio advertisement in a week and a television advertisement in two weeks. See generally J.A. 24-31. That evidence also indicated that, in her initial contacts with the agency, appellee's executive director had stated that the advertising campaign would result in litigation. J.A. 26; FEC Exh. 5, at 41-43.

terially similar ads," which appellee described as "grass-roots lobbying," that appellee might seek to run in the future. J.S. App. 7a; Amended Compl. paras. 15-16. Appellee sought a preliminary injunction barring enforcement of the statute against it. J.S. App. 7a. Because Senator Feingold was a candidate for reelection in 2004, appellee "anticipate[d] that its ongoing advertisements [would] be considered electioneering communications for purposes of federal statutory and regulatory definitions * * * during the period between August 15, 2004 and November 2, 2004." *Id.* at 59a. A three-judge district court was convened pursuant to BCRA § 403(a)(1), 116 Stat. 114 (2 U.S.C. 437h note (Supp. IV 2004)).

The district court denied appellee's request for a preliminary injunction. J.S. App. 57a-71a. In holding that appellee had not established a substantial likelihood of success on the merits, the district court construed this Court's decision in *McConnell* to foreclose as-applied challenges of the sort brought by appellee in this case. *Id.* at 61a. The district court further stated that the specific facts of this case "suggest that [appellee's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* at 62a. The court explained:

> In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will *often* convey [a] message of support or opposition" regarding candidates. Here, [appellee] and [appellee's] PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did [appellee] switch to broadcast media. This followed the PAC endorsing opponents seeking to unseat a candidate whom [appel-

> lee] names in its broadcast advertisement, and the PAC announcing as a priority "sending Feingold packing."

Id. at 62a-63a (citations omitted).

Senator Feingold was reelected in November 2004. Appellee "did not run any additional anti-filibustering ads after the 2004 election in either 2004 or in 2005 during the height of the controversy." J.S. App. 43a (Roberts, J., dissenting) (citation omitted); see FEC Exh. 3, at 101-103; J.A. 32-34. In May 2005, the district court dismissed appellee's complaint. J.S. App. 55a-56a.

6. In *WRTL I*, this Court vacated the judgment of the district court, stating that *McConnell* "did not purport to resolve future as-applied challenges" to BCRA § 203. 126 S. Ct. at 1018. The Court noted the district court's statement, in its opinion denying preliminary injunctive relief, that appellee's "advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Ibid.* The Court found it unclear, however, whether the district court had intended that statement as an alternative ground for its decision. *Ibid.* The Court remanded the case to the district court to consider the merits of appellee's as-applied challenge in the first instance. *Ibid.*

7. On remand, four Members of Congress were granted leave to intervene as defendants. J.S. App. 9a. By a divided vote, the three-judge district court subsequently entered summary judgment for appellee, holding that BCRA § 203 is unconstitutional as applied to the three advertisements that appellee had proposed to run during the 2004 election cycle. *Id.* at 1a-48a.[4]

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[4] In August 2006, appellee filed a motion for a preliminary injunction against enforcement of BCRA § 203 with respect to a new advertisement, unrelated to those at issue here, that appellee planned to run within the 60-day period before the 2006 general election. On September 7, 2006, the district court denied that motion. Appellee subsequently moved for summary judgment with

a. The district court began by considering its jurisdiction to address appellee's constitutional challenges. Specifically, the court held that appellee's as-applied challenge with respect to the 2004 advertisements remained justiciable because the challenge fell within the exception to mootness principles for claims that are "capable of repetition, yet evading review." J.S. App. 12a; see *id.* at 11a-15a. With regard to the "evading review" prong of that exception, the district court found it "entirely unreasonable, if not fanciful, to expect that [appellee] could have obtained complete judicial review of its claims in time for it to air its ads during the 30 and 60-day periods leading up to federal primary and general elections * * * in 2004." *Id.* at 13a. With respect to the "capable of repetition" prong, the district court concluded that, "[w]hile [appellee's] intention to run genuine issue advertisements during future BCRA blackout periods is not enough to sustain its generalized claim regarding 'grassroots lobbying advertisements,' it is enough to create a reasonable expectation that it will be subject to the same action again." *Id.* at 14a-15a (internal quotation marks omitted).

The district court held, however, that it lacked jurisdiction to consider appellee's "generalized lobbying claim" because that claim was "unripe." J.S. App. 16a. That claim "feature[d] a prophylactic challenge to what [appellee] anticipates to be the prohibition by the FEC of its broadcasting 'materially similar' ads in future election contests." *Id.* at 15a. The court held that this challenge was "too speculative and thus not sufficiently concrete to state a cognizable claim under Article III." *Id.* at 16a; see *id.* at 15a-16a.

b. On the merits, the district court stated that resolution of appellee's as-applied challenge required a "two-step analy-

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respect to the 2006 advertisement, and the FEC filed a motion under Federal Rule of Civil Procedure 56(f). Those motions remain pending in the district court. See J.S. App. 15a n.15.

sis of the ads in question." J.S. App. 17a. In the first step, the court sought to determine whether the 2004 advertisements were "express advocacy or its functional equivalent." *Ibid.* The court explained that, if the advertisements fit that characterization, "that would be the end of the challenge because [this] Court in *McConnell* upheld BCRA's authority to regulate [such advertisements]." *Ibid.*

In conducting the first step of its inquiry, the district court agreed with appellee that "the judicial assessment of the ads should be limited to a facial evaluation of the ads' language and images." J.S. App. 18a; see *id.* at 19a-22a. Accordingly, the court stated that it would

> limit its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate.

Id. at 22a. Based on its analysis of those factors, see *id.* at 23a-24a, the district court concluded that, "on their face, [appellee's] 2004 anti-filibuster advertisements were not intended to influence the voters' decisions," *id.* at 24a (internal quotation marks omitted), and that the advertisements therefore were "not the functional equivalent of express advocacy," *id.* at 25a.

At the second step of its analysis, the district court considered whether the government had established a state interest sufficient to justify regulation of appellee's advertisements.

J.S. App. 25a-29a. The court stated that, "[b]y permitting as-applied challenges to section 203's constitutionality, * * * [this] Court has now put in play the question it left open in *McConnell* as to whether the government interests that justify regulating express advocacy and its functional equivalent also apply to the regulation of genuine issue ads." *Id.* at 26a-27a. The district court held that the interests supporting restrictions on corporate financing of express electoral advocacy are inapposite here. *Id.* at 27a-28a.

In explaining that conclusion, the district court stated that,

> while it may be theoretically possible to craft a genuine issue ad so subtly that it subconsciously encourages (or discourages) a potential voter to support a political candidate, there is no evidentiary or common sense basis to believe that such facially neutral ads are *necessarily* intended to affect an election, or will *necessarily* be viewed as such.

J.S. App. 27a-28a. The court also dismissed Congress's interest in establishing a "bright-line rule" for determining what qualifies as an "electioneering communication" subject to regulation under BCRA. *Id.* at 28a. Because the district court found no compelling government interest in regulating appellee's 2004 advertisements, the court declined to "address whether [appellee] could/ should have pursued other options for the financing of its advertisements or altered the content of its ads so as to avoid BCRA section 203's regulation altogether." *Id.* at 29a n.24.

c. Judge Roberts dissented from the district court's grant of partial summary judgment to appellee. J.S. App. 30a-48a. He found the court's refusal to look beyond the four corners of the 2004 advertisements to be inconsistent with this Court's decision in *McConnell* and with the district court's own rul-

ings at earlier stages of this case. See *id.* at 30a, 34a-40a. He explained that "[a] purpose and effect-based inquiry seems necessary to determine if [appellee's] ads are genuine issue ads or are instead express or sham issue advocacy because the 'presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.'" *Id.* at 36a-37a (quoting *McConnell*, 540 U.S. at 193). Judge Roberts concluded that, "[b]ecause a contextual analysis is warranted and discloses deep factual rifts between the parties concerning the purpose and intended effects of the ads, neither side is entitled to judgment as a matter of law." *Id.* at 30a. In particular, Judge Roberts stated that "[a] genuine issue of material fact exists as to whether [appellee's] 2004 advertisements were intended to influence a Senate election, or to spark litigation, or to be genuine issue ads." *Id.* at 47a.

d. On December 28, 2006, on the FEC's motion, the district court clarified that its December 21 order was "a final appealable order as to those issues decided in the [accompanying] opinion," and that the court found "no just reason to delay an appeal." J.S. App. 51a; see Fed. R. Civ. P. 54(b); BCRA § 403(a)(3), 116 Stat. 114 (2 U.S.C. 437h note (Supp. IV 2004)).

SUMMARY OF ARGUMENT

The district court erred in holding BCRA § 203 unconstitutional as applied to the three advertisements at issue here.

I. Appellee's as-applied constitutional challenge, which involves advertisements that it has no continuing intent to broadcast, is moot. Appellee has failed to establish or even allege that it will again seek to finance, during one of the pre-election periods covered by BCRA § 203, either the specific advertisements at issue in this case or other advertisements having the same combination of features that the district court found decisive. The "capable of repetition, yet evading

review" exception does not render this "moot" controversy justiciable because appellee has failed to show that the "same controversy" is likely to recur. In particular, appellee has failed to show that it is likely to run future advertisements having the five characteristics that the district court found dispositive in disposing of appellee's as-applied claim.

II. BCRA § 203 is constitutional as applied to the three advertisements at issue in this case. Whatever the ultimate scope of as-applied challenges permitted to Congress's bright-line rule in BCRA § 203, the advertisements at issue in this case fall comfortably within the heartland of "electioneering communications" that Congress may permissibly regulate under this Court's precedents. Particularly when viewed in context, the advertisements are the functional equivalent of the sort of express advocacy that this Court has long recognized may be constitutionally regulated under FECA and its separate-segregated-fund provision.

A. The district court erred by positing the existence of a sharp distinction between issue advocacy and electioneering in the immediate runup to an election. This Court has repeatedly recognized that no such clear divide exists, and that discussion of issues of public importance is often intertwined with advocacy of electoral outcomes, especially as the election approaches. The fact that appellee's advertisements took the form of appeals to listeners and viewers to contact their elected representatives (and to visit a website attacking a federal candidate) provides no basis for sustaining appellee's as-applied challenge. To the contrary, advertisements taking that form were the principal abuse at which BCRA's "electioneering communications" provisions were directed.

B. In holding BCRA § 203 unconstitutional as applied to appellee's advertisements, the district court relied in part on its perception that the advertisements did not "necessarily" have an electoral purpose or effect. This Court has already

held, however, that BCRA § 203 is constitutional on its face, and it was appellee's responsibility to demonstrate that the generalization on which that provision is based does *not* hold true here. That allocation of burdens is consistent with this Court's prior decisions adjudicating as-applied challenges to facially valid provisions of the campaign-finance laws. Placing the burden of proof on appellee is especially appropriate in the present context because BCRA § 203 leaves ample alternatives open to corporate advertisers who do not in fact seek to influence federal elections.

C. The district court erred in purporting to limit its inquiry to the "four corners" of the 2004 advertisements and in refusing to consider important extrinsic evidence that reinforced the inference of electioneering intent. The court stated that consideration of such evidence would render the constitutional inquiry unworkable and would deprive regulated parties of clear guidance concerning the applicable law. As BCRA's definition of "electioneering communication" itself demonstrates, however, the district court's analysis is flawed because it assumes a false dichotomy between an exclusive focus on an advertisement's text and an entirely unstructured examination of all potentially relevant circumstances. The court's stated objectives of improving administrability and providing clear guidance to advertisers are understandable, but they are appropriately served by adhering as closely as possible to the bright-line rule drawn by Congress and by minimizing the circumstances in which as-applied challenges require the courts to depart from that rule.

The district court's refusal to consider certain communications critical of Senator Feingold that were posted on appellee's "BeFair.org" website was especially misguided, since the broadcast advertisements at issue here explicitly exhorted listeners and viewers to visit that website. Even if it were appropriate to limit the as-applied inquiry to textual indicia,

a corporation surely cannot claim a constitutional right to engage in "issue" advocacy when its advertisements expressly reference a website that presents overt attacks on a candidate who is named in the advertisements and is facing reelection in the same window of time that the advertisements run.

BCRA's definition of "electioneering communication," which is restricted to broadcast advertisements aired within the 30- and 60-day periods preceding federal primary and general elections, reflects Congress's understanding that the timing of an advertisement that mentions a federal candidate is important evidence of electoral purpose and effect. The Court in *McConnell* recognized the accuracy of that generalization. The timing of appellee's broadcast advertisements strongly reinforced the inference that those advertisements were intended to influence the Wisconsin Senate election and would likely have that effect. Appellee commenced its advertising campaign at a time when Congress was out of session, and it abandoned its efforts after the election occurred, even though public controversy over the "issue" on which appellee claimed to be advocating—filibustering of judicial nominees—reached its height during the spring of 2005.

The district court also erred in refusing to consider evidence of other, contemporaneous communications in which appellee opposed Senator Feingold's reelection and specifically criticized his record on the issue of judicial filibusters. Although those communications were not themselves subject to BCRA's "electioneering communications" provisions, they reinforced the inference that the broadcast advertisements had an electioneering purpose. Adoption of the district court's view that such communications are irrelevant to the constitutional inquiry would create an artificial analysis in which directly relevant evidence is disregarded, not to mention substantial opportunities for circumvention of BCRA's financing restrictions on corporate electioneering.

ARGUMENT

I. APPELLEE'S AS-APPLIED CONSTITUTIONAL CHALLENGE WITH RESPECT TO ITS 2004 ADVERTISEMENTS IS MOOT

A. "The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain [this Court's] jurisdiction * * * it is not enough that a dispute was very much alive when suit was filed." *Id.* at 477-478.

Even after the 2004 Wisconsin Senate election, when appellee could lawfully have spent its treasury funds to air the three advertisements at issue here, appellee declined to do so. Appellee does not assert any continuing interest in running those advertisements, nor does it identify any reason to believe that a significant dispute over Senate filibusters of judicial nominees will occur in the foreseeable future. And because appellee chose not to run its advertisements during the electioneering communications periods preceding the 2004 Wisconsin Senate election, it cannot be subject to any future Commission enforcement action whose validity might turn on whether BCRA's financing restrictions are constitutional as applied to those advertisements. Because no live controversy exists with respect to the three advertisements appellee proposed to broadcast during 2004, appellee's claims with respect to those advertisements are moot and no longer suitable for

judicial resolution. Compare *Christian Civic League of Maine, Inc.* v. *FEC*, No. 06-cv-0614 (D.D.C. Sept. 27, 2006), juris. statement pending, No. 06-589 (filed Oct. 26, 2006).[5]

B. This Court has recognized an exception to mootness principles for situations that are "capable of repetition, yet evading review." See *Southern Pac. Terminal Co.* v. *ICC*,

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[5] This Court has statutory jurisdiction over the instant appeals. The three-judge district court granted appellee's motion for summary judgment with respect to the three specific advertisements that appellee had proposed to run in 2004, see J.S. App. 16a-29a, while holding that appellee's claim for relief with respect to unspecified "materially similar grass-roots lobbying ads" was unripe because it was "too speculative and thus not sufficiently concrete to state a cognizable claim under Article III" of the Constitution, *id.* at 16a. The district court has not yet resolved appellee's as-applied challenge with respect to a new advertisement that appellee planned to run within the 60-day period before the 2006 general election. See note 4, *supra*. The court has clarified, however, that its December 21 order was a "final appealable order as to those issues decided in the [accompanying] opinion," and that the court found "no just reason to delay an appeal." J.S. App. 51a.

BCRA § 403(a)(3) states that a "final decision" of a three-judge district court in a suit challenging the constitutionality of any BCRA provision "shall be reviewable only by appeal directly to" this Court. 116 Stat. 114 (2 U.S.C. 437h note (Supp. IV 2004)). Because BCRA does not define the term "final decision," the term should be given the same meaning that it has in 28 U.S.C. 1291, which defines the jurisdiction of the courts of appeals. Although compliance with the "final decision" requirement of Section 1291 usually requires entry of an order that terminates the entire case, the district court in a suit involving multiple claims or multiple parties "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment." Fed. R. Civ. P. 54(b); see, *e.g.*, *Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 7-8 (1980); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 438 (1956) (explaining that Rule 54(b) "scrupulously recognizes the statutory requirement of a 'final decision' under § 1291" and "administers that requirement in a practical manner in multiple claims actions"); *id.* at 432-438. Because the district court certified its summary-judgment ruling as final in accordance with Rule 54(b), this Court is vested with exclusive appellate jurisdiction over the instant appeals.

219 U.S. 498, 515 (1911). "[T]he capable-of-repetition doctrine applies only in exceptional situations," *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983), "where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again," *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998) (citations and internal quotation marks omitted) (quoting *Lewis*, 494 U.S. at 481). For an alleged wrong to be considered "capable of repetition," "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). Accord, *e.g.*, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774 (1978).

As the district court recognized, see J.S. App. 14a-15a, the mootness inquiry cannot be conducted wholly in isolation from a court's understanding of the legal regime that would govern its disposition of the lawsuit on the merits. In order to demonstrate a probability that it will again become involved in the "same controversy," *Murphy*, 455 U.S. at 482, a plaintiff need not establish that the precise facts of the case before the court are likely to be replicated, but it must demonstrate that its future plans will generate essentially the same controversy. In the present context, appellee must show that (1) it is likely to run future advertisements during BCRA pre-election periods, (2) those advertisements will fall within the BCRA definition of "electioneering communication," and (3) those advertisements will share the characteristics that the district court deemed legally relevant to the disposition of appellee's as-applied challenge. Cf. *Lewis*, 494 U.S. at 481.

The district court found that appellee's generalized statement of intent to finance "genuine issue advertisements dur-

ing future BCRA blackout periods" was "enough to create a 'reasonable expectation' that [appellee] 'will be subject to the same action again.'" J.S. App. 15a. But an intent to run advertisements that involved express advocacy, or advertisements that even appellee conceded would amount to its functional equivalent, would not generate the "same controversy" as this case. And, as particularly relevant in light of the district court's merits ruling, the district court did not find, and appellee has identified no basis for concluding, that appellee will again seek to finance pre-election advertisements sharing the five characteristics, see *id.* at 22a, that the district court found dispositive in sustaining appellee's as-applied challenge. Absent such a finding, appellee cannot show that it will likely be a party to the "same controversy" in the future, and the instant suit is not "capable of repetition" within the meaning of this Court's precedents. Cf. *McConnell* v. *FEC*, 540 U.S. 93, 225-226 (2003).[6]

C. The district court also cited a number of cases in which various "election-related challenges" were held to be "capable of repetition, yet evading review." J.S. App. 12a. The court's reliance on those decisions was misplaced. When a plaintiff demonstrates an intent to participate in *electoral processes* on an ongoing basis, a court may have reasonable grounds for

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[6] Even if a substantially similar controversy were to recur in the future, appellee's as-applied challenge would not necessarily evade review. Even the massive litigation in *McConnell* took less than 21 months from the time complaints were filed until a final decision by this Court. There is no reason to assume that the time between the filing of a far simpler suit like this one and the occurrence of an election would be "always so short as to evade review." *Spencer*, 523 U.S. at 18. Principles of expeditiousness would presumably allow a suit to be brought well in advance of the BCRA pre-election time periods, and even if such pre-enforcement, as-applied challenges cannot be fully litigated, the same issues can be fully litigated in the more traditional as-applied context, *viz.*, enforcement actions. There is consequently no structural impediment in this setting to full judicial review of the relevant issues.

concluding that any injury the plaintiff suffers during one election will be repeated during later electoral cycles. The gravamen of appellee's as-applied challenge, by contrast, is that the temporal overlap between its lobbying plans and the 2004 Wisconsin Senate campaign was simply fortuitous, and that its purported issue advocacy has been unconstitutionally restricted even though it *lacks* the intent to influence federal elections. Appellee's claim that it will again be involved in the "same controversy" thus rests not on a continuing interest in electoral participation, but on a prediction that similar coincidences will arise in the future. In light of appellee's disavowal of any intent to engage in electoral advocacy, there is no sound reason to conclude on the record before this Court that appellee will again wish to finance, during the relatively brief pre-election periods covered by BCRA § 203, advertisements having the particular characteristics that the district court found legally dispositive.

Because appellee's claims are moot, this Court should order that the district court's judgment and decision on the claims at issue be vacated and appellee's suit dismissed. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

II. BCRA § 203 IS CONSTITUTIONAL AS APPLIED TO THE THREE ADVERTISEMENTS AT ISSUE IN THIS CASE

In addressing appellee's as-applied challenge in this case, the district court stated that it would

> limit its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of legislative scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described is-

> sue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate.

J.S. App. 22a. Although the district court did not specify precisely how those factors should be balanced, the court evidently concluded that, at least if each of the five enumerated considerations suggests a lack of electioneering intent—*i.e.*, if a particular advertisement possesses characteristic (1) and does not possess characteristics (2)-(5)—then BCRA § 203's financing restrictions are unconstitutional as applied to that advertisement. See *id.* at 23a-24a.

The district court construed this Court's remand order in *WRTL I* as a "tacit acknowledgment that, notwithstanding the virtues of a bright-line test, there may nonetheless be some ads that are unconstitutionally captured by BCRA section 203." J.S. App. 28a. The court cited (*ibid.*) this Court's decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which held FECA's ban on corporate electoral spending unconstitutional as applied to a defined class of corporate entities. See p. 4, *supra*. The decision in *MCFL* is indeed instructive with respect to the proper mode of analyzing as-applied challenges to BCRA § 203, but it does not support the approach taken by the district court.

The Court in *MCFL* explained that the rationale for prohibiting corporate independent expenditures in support of federal candidates "does not extend uniformly to all corporations," and that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." 479 U.S. at 263. The Court stated that "MCFL has three features essential to [the Court's] holding that it may not constitutionally be bound by § 441b's restriction on independent spending." *Id.* at 263-264; see *id.* at 264 (describing three essential

characteristics); p. 4, *supra*. Based on the presence of those factors, the court specifically rejected the hypothesis that "MCFL merely poses less of a threat of the danger that has prompted regulation," in which case the Court noted that it would "not second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not in kind." 479 U.S. at 263. The Court concluded instead that MCFL "does not pose such a threat at all." *Ibid.*; see *id.* at 264 (stating that the identified characteristics "ensure[d]" that MCFL's electoral spending would not implicate the concerns at which the general ban is directed). The constitutional exemption recognized in *MCFL* is thus easily administrable (since it focuses on the nature of the corporation rather than on an examination of the text or content of particular advertisements, and corporations having the essential characteristics can readily be identified), and it applies only to corporations that *assuredly* do not pose the danger at which the general statutory ban is directed at all, rather than trying to discern differences of degree.

In order to succeed in its as-applied constitutional challenge, appellee should similarly be required to articulate a legal test that satisfies the same criteria—or, to put it another way, a test that avoids the pitfalls of both undue complexity *and* susceptibility to evasion. The district court's five-factor test does not satisfy those criteria. The district court correctly recognized that an approach that required examination of *all* facts that are potentially relevant to the ascertainment of an advertisement's purpose or effect could not feasibly be administered, especially under the time constraints of expedited pre-election litigation. Moreover, to the extent that such an approach involved close parsing of the nuances of an advertisement's text, it would disserve First Amendment values. However, in attempting to minimize those problems, the district court confined its inquiry to an artificially truncated

set of facts, articulated a test that identifies only those advertisements that are *most obviously* election-related, and effectively held BCRA § 203 unconstitutional as applied to all other "electioneering communications." Acceptance of that approach would be inconsistent with this Court's holding in *McConnell* that BCRA § 203 is facially constitutional, would facilitate easy circumvention of BCRA § 203, and would reintroduce the difficulties of enforcement that formerly existed under the "express advocacy" test.

The district court's analysis reflects at least three critical errors. First, the court posited the existence of an unrealistically sharp distinction between issue advocacy and electioneering, notwithstanding the recognition of both Congress and this Court that the two substantially overlap. Second, the court improperly placed upon the government the burden of establishing that the three advertisements implicate the concerns that BCRA § 203 is intended to address, rather than requiring appellee to demonstrate its constitutional entitlement to an exemption from a facially valid law. Third, the court erroneously refused to consider highly probative contextual evidence, which substantially reinforced the inference that appellee's advertisements were intended to influence the 2004 Wisconsin Senate election and were likely to have that effect. As a consequence of those errors, the district court held BCRA § 203 unconstitutional as applied to advertisements that, when fairly considered, are in the heartland of the advertisements that Congress intended to and did reach in BCRA § 203, and indeed are the functional equivalent of the express advocacy that the Court has long held can be regulated by FECA and its separate-segregated-fund provision.[7]

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[7] In *McConnell*, this Court stated that, "to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy," the governmental interests that supported financing restrictions on express

A. Congress And This Court Have Recognized That Advertisements Urging Citizens To Contact Their Elected Representatives Are Often Intended To Influence Federal Elections And Will Frequently Have That Effect

The district court's analysis assumes the existence of a clear divide between electoral advocacy and "genuine issue-advertisements." See J.S. App. 16a-17a, 26a-28a. Confining its inquiry to the four corners of appellee's 2004 advertisements, the district court observed that "the language in [appellee's] advertisements does not mention an election, a candidacy, or a political party, nor do they comment on a candidate's character, actions, or fitness for office." *Id.* at 23a. The court concluded that, "on their face, [appellee's] three 2004 anti-filibuster advertisements were not intended to influence the voters' decisions." *Id.* at 24a (internal quotation marks omitted).

That analysis cannot be squared with this Court's precedents and essentially ignores the fundamental dynamic that Congress recognized in BCRA and the Court acknowledged

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advocacy apply equally to "electioneering communications." 540 U.S. at 206; see *id.* at 205-206. In the instant case, the district court framed the relevant question as "whether [appellee's] 2004 anti-filibuster ads are express advocacy or its functional equivalent," J.S. App. 22a, and concluded that they are not, see *id.* at 22a-25a. In the context of the *McConnell* opinion as a whole, however, the Court appears to have used the phrase "functional equivalent" to encompass *all* advertisements naming a federal candidate that are intended to influence elections or are likely to have that effect. To the extent the district court construed that phrase as limited to a subset of advertisements that are *most obviously* election-related, the court erred in concluding that BCRA § 203 may constitutionally be applied only to such advertisements. More broadly, while functional equivalence may have been a useful concept in upholding the bright-line limitations of BCRA § 203, the Court in no way suggested that functional equivalence or its absence was itself a workable or administrable standard to identify advertisements that would give rise to a viable as-applied challenge.

in *McConnell*. More than 30 years ago, the Court observed that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley* v. *Valeo*, 424 U.S. 1, 42 (1976) (per curiam). In *McConnell*, the Court quoted, as an accurate (and colorful) description of this reality, the statement of a National Rifle Association (NRA) official that "[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." 540 U.S. at 126 n.16; see *id.* at 327 (Kennedy, J., dissenting).

This Court has also long recognized the infeasibility of determining, on an ad hoc, case-by-case basis, whether particular advertisements discussing issues of public concern are actually intended to influence federal elections. The Court initially sought to obviate the need for such difficult inquiries by construing federal restrictions on electioneering to apply only to communications that expressly advocated an electoral result. See *Buckley*, 424 U.S. at 43, 80; *MCFL*, 479 U.S. at 248-249. When the inadequacy of that test became apparent to all, Congress crafted the BCRA definition of "electioneering communication" and prohibited the use of corporate treasury funds to finance "electioneering communication[s]" as so defined. See *McConnell*, 540 U.S. at 126-129, 193-194; pp. 5-6, *supra*. That definition represents Congress's considered effort, based on the substantial experience of its Members as participants in the political process and on evidence obtained through numerous hearings on the matter, to identify through clear, objective, and easily applied criteria—criteria that do not require courts to make judgment calls based on fine parsing of the nuances of an advertisement's text—a class of communications that are generally intended to influence electoral outcomes and are likely to have that effect.

BCRA's definition of "electioneering communication" encompasses advertisements that urge viewers or listeners to contact an identified Member of Congress concerning an issue of public importance, provided that the advertisement is targeted to the relevant electorate and is aired during the 30- or 60-day period before a primary or general election in which that legislator is a candidate. That clear and administrable test was deemed necessary to target the *principal* means by which the pre-BCRA restrictions on corporate electoral advocacy were evaded. The record in *McConnell* made that clear. See, *e.g.*, *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 304 (D.D.C. 2003) (Henderson, J.); *id.* at 532-536 (Kollar-Kotelly, J.); *id.* at 875-879 (Leon, J.). In discussing the sorts of pre-BCRA advertisements that were intended to influence federal elections but avoided words of express advocacy, the Court in *McConnell* observed that "[l]ittle difference existed * * * between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. The Court thus treated an appeal to citizens to contact their elected representative, when targeted to the relevant electorate and issued during the 30- and 60-day periods preceding federal primary and general elections, as a *paradigmatic* example of the advertisements that BCRA's "electioneering communication" provisions were intended to address.

Expert testimony introduced by the FEC in this case is to the same effect. The declaration of veteran political consultant Douglas L. Bailey stated:

> A purported issue ad that airs in the time immediately preceding an election that implores a voter to "contact" or "tell" a candidate about one's opposition to a certain policy will unavoidably affect that candidate's election. During the election time period, the implicit message to the voter

> is that one way to change the policy would be to remove that candidate from office on election day. Conversely, an issue ad which airs during the pre-election period and implores a voter to contact or tell a candidate about one's support for a particular policy, implicitly suggests that one way to continue that policy is to vote for the reference[d] candidate.

J.A. 57.[8] The declarant also explained that "[a] true *issue* ad campaign is most effective when it is aired *outside* of the time period immediately before an election, when its message—even if the message refers to an officeholder—will not be received as another variety of candidate campaign ad." J.A. 56 (emphasis added).

In *McConnell*, this Court found that, of the pre-BCRA "issue ads that clearly identified a candidate and were aired during [the 30- and 60-day] preelection timespans," the "vast majority of ads clearly had [an electioneering] purpose." 540 U.S. at 206. The fact that appellee's advertisements took the form of appeals to citizens to contact their elected representatives on an issue of public importance provides no basis for regarding those advertisements as exceptions to the general rule. To the contrary, advertisements taking that form were the *principal focus* of Congress's concern when it crafted BCRA's "electioneering communication" provisions.

B. Appellee Bears The Burden Of Establishing Its Entitlement To A Constitutional Exemption From A Facially Valid Law

Appellee's 2004 advertisements differed in one respect from such pre-BCRA advertisements as the "Jane Doe" hypo-

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[8] In *McConnell*, Mr. Bailey's testimony was cited with apparent approval by this Court, see 540 U.S. at 193 n.77, and by each of the three members of the district court, see 251 F. Supp. 2d at 305 (Henderson, J.); *id.* at 528-529 (Kollar-Kotelly, J.); *id.* at 874, 880 (Leon, J.)

thetical described in *McConnell*. That hypothetical advertisement "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 127. Appellee's advertisements, by contrast, contained no direct criticism of Senator Feingold's record on the issue of judicial filibusters (although, as explained below, they specifically exhorted listeners to visit a website that *did* criticize Senator Feingold's record on the filibusters). See J.S. App. 18a.

The district court did not assert, however, let alone identify any evidentiary basis for concluding, that the absence of any direct references to Senator Feingold's voting record in the 2004 advertisements dispelled any possible inference of electioneering purpose or effect. To the contrary, the court acknowledged that "it may be theoretically possible to craft" such an advertisement "so subtly that it subconsciously encourages (or discourages) a potential voter to support a political candidate." J.S. App. 27a. (One easy way to craft such advertisements without the need for subtlety is to urge listeners or viewers to visit a website that directly attacks the candidate.) The court found, however, that "there is no evidentiary or common sense basis to believe that such facially neutral ads are *necessarily* intended to affect an election, or will *necessarily* be viewed as such." *Id.* at 27a-28a. The court concluded on that basis that BCRA § 203 is unconstitutional as applied to those advertisements.

Contrary to the district court's suggestion, it was not *the government's* burden to prove, in this as-applied challenge, that the generalization on which BCRA's "electioneering communication" provisions are based "necessarily" holds true in this case. The Court in *McConnell* upheld BCRA § 203 against a facial constitutional challenge, see 540 U.S. at 203-209, and it recognized that the "vast majority" of pre-BCRA advertisements "that clearly identified a candidate and were

aired during [the 30- and 60-day] preelection timespans" had an electioneering purpose, *id.* at 206. The Court also recognized that the ease with which corporations could avoid BCRA's limitations prospectively, by addressing the issue of concern without explicitly linking the issue to a candidate, meant that going forward even fewer instances in which the corporation insisted on linking a candidate to an issue would not involve an electioneering purpose. See *ibid.* In claiming a constitutional entitlement to an exemption from BCRA § 203's financing restrictions, *appellee* assumed the burden of demonstrating (at least) that the generalization reflected in BCRA's definition of "electioneering communication" does *not* hold true here.

That allocation of burdens is consistent not only with the customary presumption that Acts of Congress are constitutional (which applies with particular force to statutes already upheld on their face by this Court), but also with prior decisions of this Court that have sustained as-applied challenges to other provisions of the campaign-finance laws. In *Buckley*, for example, the Court held that the FECA's disclosure provisions are constitutional on their face and as applied to minor parties generally. See 424 U.S. at 64-74. The Court noted, however, that a particular minor party could establish a meritorious as-applied constitutional challenge by demonstrating "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals." *Id.* at 74. When the Court later addressed such an as-applied challenge in *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982), it followed *Buckley* and based its decision on the party's "proof of specific incidents of private and government hostility toward the [minor party] and its members." *Id.* at 99.

The Court in *MCFL* employed a similar mode of analysis. The defendant corporation in that case argued that the

FECA's prohibition on the use of corporate treasury funds to finance express electoral advocacy, 2 U.S.C. 441b, was unconstitutional as applied to the defendant's own campaign-related expenditures. Although the Court ruled in the corporation's favor, the Court did not suggest that *the government* bore the burden of proving that MCFL's campaign spending would actually cause the problems at which the statutory ban is directed. To the contrary, the Court stated that it would "not second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not in kind." 479 U.S. at 263. The Court held the statute unconstitutional as applied only after concluding that the corporation's expenditures would *not* cause those problems—*i.e.*, that "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL." *Ibid.* The Court explained that "[i]t is not the case * * * that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all." *Ibid.*; see *id.* at 264 (identifying specific attributes of MCFL that "ensure[d]" that the organization's election-related spending would not implicate the policy rationales underlying the FECA ban on corporate campaign expenditures); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982); pp. 26-27, *supra*.

Placing the burden of proof on the party seeking a constitutional exemption from a facially valid law is especially appropriate in the present context because BCRA § 203 imposes relatively minor burdens on corporate speakers who do not seek to influence federal elections. As the Court in *McConnell* observed, "corporations and unions may finance genuine issue ads during [pre-election] timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206. Thus, even if a particular corporation actually lacks the intent to influence federal elections, it will suf-

fer no substantial impairment of its ability to engage in issue advocacy—it will simply be required to use a separate segregated fund to pay for the advertisements.[9] Alternatively, appellee could have financed the advertisements with general treasury funds if it had omitted any reference to Senator Feingold. And of course other media remain unaffected by BCRA § 203. The district court erred in refusing to take those alternatives into account in conducting its constitutional analysis. See J.S. App. 29a n.24.

C. The District Court Erroneously Refused To Consider Highly Relevant Evidence Confirming That Appellee's Advertisements Were Intended To Affect The Wisconsin Senate Election And Could Be Expected To Have That Effect

As Judge Roberts explained in dissent, see J.S. App. 41a-45a, a substantial body of evidence outside the text of the 2004 advertisements—including materials directly referenced in those advertisements—suggests that the advertisements were intended at least in part to affect the Senate election and could be expected to have that effect. Indeed, when it denied appellee's request for a preliminary injunction, the district court had previously relied on that evidence in concluding that appellee's 2004 advertisements "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* at 62a; see *id.* at 38a-39a & n.7 (Roberts, J.,

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[9] Appellee could also have chosen to structure itself as an *MCFL* organization, see p. 4, *supra*, which would have allowed it to finance electioneering communications with general treasury funds, see *McConnell*, 540 U.S. at 209-211. Appellee chose instead (1) to accept substantial contributions from business corporations, both in general and to finance the specific advertisements at issue here, see pp. 8, 11, *supra*; and (2) to fund the advertisements at issue through general treasury funds rather than through a PAC. As a result, it placed itself squarely within the heartland of the concerns that BCRA § 203 is intended to address.

dissenting). In granting appellee's later motion for summary judgment, however, the court stated that it would "limit its consideration to language within the four corners of the anti-filibuster ads." *Id.* at 22a; see *id.* at 19a-22a.[10] The court relied in part on the practical concern that "as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." *Id.* at 19a. The court also stated that "delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake." *Id.* at 20a.

The district court's concern about the administrability of an "as-applied" standard that was not limited to the text of the advertisements is understandable in light of Congress's effort to establish a bright-line rule to avoid inquiries into

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[10] Although the district court stated that it would limit its inquiry to the "four corners" of the advertisements, it did not actually do so. One of the factors that the court specifically identified as relevant to its constitutional analysis was whether appellee's advertisements "describe[d] a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future." J.S. App. 22a. Determining whether Senate filibusters of judicial nominees were the subject of current or imminent "legislative scrutiny" at the time appellee sought to run its advertisements necessarily required examination of facts outside the "four corners" of the advertisements. See pp. 45-47, *infra*. In addition, as Judge Roberts explained in dissent, the structure of the advertisements strongly suggests that "Senator Feingold might be one of the 'group of Senators . . . causing gridlock and backing up some of our courts to the state of emergency." J.S. App. 41a. Unlike a discrete legislative issue that comes up for a vote once, as to which an advertisement could be carefully directed at a legislator with or without a stated position, a complaint about a recurring procedural device that has already caused "gridlock" is logically directed only at the legislators who have already supported or employed the device. Accordingly, "even a textual approach could suggest that * * * [the advertisements] might have implicitly discouraged Senator Feingold's election." *Ibid.*

electoral intent on an advertisement-by-advertisement basis. But to the extent that as-applied challenges to Congress's bright-line rule are permissible, the proper means of ensuring administrability is not by excluding potentially relevant evidence of the speaker's electoral intent by artificially limiting the inquiry to the "four corners" of the advertisement, much less barring consideration of materials (such as websites) that are expressly incorporated by reference in the advertisement. As Congress appreciated, there are great virtues in establishing a bright-line rule in this area, but the answer to avoiding uncertainty in the as-applied context cannot be to artificially narrow the inquiry to the "four corners" of the advertisement. That approach effectively reintroduces an easily circumvented test that focuses on the presence or absence of certain magic words of the sort that Congress found inadequate and replaced with a broader, but still bright-line rule that this Court has already upheld on its face.

The errors of the district court are multiple, but not discrete. The court's refusal to consider highly probative evidence outside the "four corners" of the 2004 advertisements, coupled with its inquiry into whether those advertisements were "necessarily" intended to influence an election (see pp. 32-36, *supra*), essentially framed the relevant question as whether the advertisements were on their face *incapable* of being valid issue advertisements. That approach seems functionally indistinguishable from the "express advocacy" standard, which was designed to identify "spending that is unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. BCRA's "electioneering communications" provisions, however, reflect Congress's response to the demonstrated inadequacy of the "express advocacy" test. See *McConnell*, 540 U.S. at 126-129, 193-194. In sustaining those provisions against a facial challenge, this Court in *McConnell* squarely held that the "express advo-

cacy" standard is not constitutionally mandated. See *id.* at 190-194. Adoption of the district court's approach to as-applied challenges would be tantamount to overruling that holding.[11]

Taken in combination, moreover, the district court's "four corners" requirement and its focus on whether particular advertisements "necessarily" reflect electioneering intent suggest that BCRA § 203 cannot constitutionally be applied to an advertisement whose text alone suggests that it is likely but not certainly the functional equivalent of express advocacy, even if other evidence would make absolutely clear that the advertisement was the functional equivalent of express advocacy. Not only is that approach inconsistent with this Court's precedents, but the combined effect of the district court's errors would almost certainly render a significant percentage of advertisements during the last days of an electoral campaign immune from regulation under BCRA § 203. That prospect cannot be squared with this Court's holding in *McConnell* that BCRA § 203 is not substantially overbroad.

For the reasons that follow, the district court's rationales for purporting to limit its inquiry to the "four corners" of the 2004 advertisements are unpersuasive. In particular, the court erred in declining to consider the government's evidence concerning (a) the content of the website expressly referenced in the 2004 advertisements, (b) the timing of those advertisements, and (c) appellee's contemporaneous advocacy concerning the Wisconsin Senate race. That evidence substantially reinforces the inference that the advertisements at

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[11] Indeed, rather than faithfully implementing this Court's holding in *McConnell*, the district court's approach essentially incorporates the view taken in Justice Thomas's dissent that any power Congress may possess in this area is limited to regulation of corporate speech that is "unambiguously campaign related." *McConnell*, 540 U.S. at 281, 283 (opinion of Thomas, J.) (quoting *Buckley*, 424 U.S. at 81).

issue in this case were intended to influence the election and would likely have that effect.

1. The district court's stated reasons for declining to consider probative evidence outside the "four corners" of the 2004 advertisements are unpersuasive

a. In refusing to consider contextual evidence outside the "four corners" of the 2004 advertisements, the district court relied in part on concerns of practical administrability. The court suggested that, if the inquiry in an as-applied challenge extended beyond the text of the relevant advertisements, it would necessarily entail the deposition of the organization's officials and the submission of expert testimony. See J.S. App. 19a. The court found that such an approach would be "practically unacceptable because as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." *Ibid.*

The district court's practical concerns are unfounded, since they presume a false dichotomy between an analysis confined to an advertisement's text and an unstructured inquiry involving all potentially relevant evidence of subjective intent. The plaintiff in an as-applied challenge should indeed be required to articulate an administrable standard for identifying a class of advertisements that, while falling within BCRA's definition of "electioneering communications," do not pose the danger at which BCRA § 203 is directed. See p. 27, *supra*. There is no basis, however, for the district court's view that any consideration of facts outside the "four corners" of the advertisement will necessarily render the inquiry unworkable.

Indeed, BCRA's definition of "electioneering communication" exposes the error in the district court's analysis. That

definition correlates strongly (though admittedly not perfectly) with actual intent to influence federal elections. See *McConnell*, 540 U.S. at 206 (stating that the "vast majority" of pre-BCRA advertisements falling within the definition had an electioneering purpose). Applying the definition to a particular advertisement requires both a narrow and focused consideration of the advertisement's text (specifically, whether it refers to a clearly identified candidate for federal office), and equally cabined consideration of external factors (whether it was aired during one of the specified pre-election periods and was targeted to the relevant electorate). The definition demonstrates that the consideration of relevant atextual factors does not require an unstructured or open-ended inquiry. A principal *virtue* of the statutory definition is that it "raises none of the vagueness concerns that drove [the Court's] analysis in *Buckley*" and does not enmesh the courts in subjective parsing of the nuances of an advertisement's text, but rather provides a bright-line rule whose "components are both easily understood and objectively determinable." *Id.* at 194. Just as the BCRA definition provides a clear bright-line rule even though it requires examination of facts outside an advertisement's text, the constitutional standard governing as-applied challenges need not be confined to an advertisement's "four corners" in order to be workable.

b. The district court also stated that a legal regime in which "federal judges would be charged with conjuring the subjective intent of the speaker to affect the election would fly in the face of decades of First Amendment jurisprudence and undoubtedly chill those exercising their free speech rights." J.S. App. 21a-22a. Appellee had no constitutional right, however, to use treasury funds to finance advertisements that were intended to influence the 2004 Wisconsin Senate race. By alleging that BCRA § 203 is unconstitutional as applied to its 2004 advertisements, appellee necessarily placed at issue

the question whether those advertisements had an electioneering purpose. Indeed, appellee's principal submission was that it lacked such a purpose even though its advertisements fell within a statutory definition that the Court not only had already upheld on its face, but also had already determined did a good (and constitutionally adequate) job of identifying advertisements with that purpose. The purported infeasibility or impropriety of deciding whether appellee has carried its burden on that point cannot plausibly be regarded as a reason to *sustain* appellee's as-applied challenge.[12]

c. As the district court recognized, potential speakers may indeed be chilled if the legality of particular communications or financing arrangements turns on an unstructured post hoc inquiry into the speaker's likely intent. J.S. App. 20a-21a; see *Buckley* 424 U.S. at 42-43. The articulation of clear, objective rules defining the circumstances under which the forbidden intent will be inferred therefore furthers First Amendment values. An inquiry limited to the "four corners" of an advertisement, however, is not inherently more objective or precise than an inquiry that includes consideration of facts external to the advertisement's text.

In any event, BCRA's definition of "electioneering communication" itself eliminates the indeterminacy that concerned the district court. Any uncertainty that appellee may face results not from lack of clarity in the law that Congress en-

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[12] The district court's analysis is especially misguided because the court also declined to assess whether the 2004 advertisements would likely have had an electoral *effect*, stating that "reliance on effect, without the requisite intent, would be the equivalent of permitting listeners' subjective impressions to justify the regulation of protected speech." J.S. App. 24a-25a. This Court in *McConnell*, however, considered both the purpose *and* the effect of prior advertisements falling within BCRA's definition of "electioneering communication" in upholding BCRA § 203 against a facial constitutional challenge. See, *e.g.*, 540 U.S. at 126-128, 193, 206.

acted, but from appellee's insistence that a less clearly defined constitutional rule effectively supersedes the statutory standard. The district court's stated objectives of improving administrability and providing clear guidance to corporate advertisers would be furthered by adhering as strictly as possible to the bright-line definition drawn by Congress and upheld on its face by this Court, and by reserving as-applied challenges for circumstances that are demonstrably removed from the core conduct at which BCRA's "electioneering communications" provisions are directed and could be defined without reference to the text or content of the advertisement, as with the *MCFL* exception. The district court, however, erroneously treated those objectives as grounds for *broadly defining* the range of circumstances under which as-applied challenges will be sustained.

2. The contextual evidence that the district court declined to consider confirms that the advertisements at issue here were likely intended to influence the Wisconsin Senate election and could be expected to have that effect

a. The most extreme example of the district court's unwillingness to consider probative contextual evidence beyond the "four corners" of the 2004 advertisements was its refusal to consider the content of the website "BeFair.org," which appellee established in conjunction with its anti-filibuster campaign, and which was explicitly referenced *in the advertisements*. See J.S. App. 22a-23a n.18. Each of the advertisements at issue here urged listeners and viewers to visit that website, see *id.* at 67a, 69a, 71a, which featured "e-alerts" excoriating Senator Feingold on the judicial-filibuster issue. See *id.* at 41a (Roberts, J., dissenting); J.A. 86-90. The district court concluded that, because internet communications are not themselves subject to regulation under BCRA's "elec-

tioneering communications" provisions, the content of appellee's website was irrelevant to the disposition of its as-applied challenge. J.S. App. 22a-23a n.18.

That is a non sequitur. A court could not cogently assess the likely purpose and effect of a broadcast advertisement urging viewers to "look at the billboard on Main and First Streets" without examining the billboard's message. The same principle applies here. The content of a website that the 2004 advertisements urged listeners and viewers to visit is manifestly relevant to an assessment of the advertisements' intended *purpose and effect*, even though the website itself is not subject to BCRA's "electioneering communications" provisions. The district court's refusal to consider this evidence is particularly striking because one of the five aspects of the advertisements that the court specifically identified as relevant to the constitutional analysis was whether the advertisements "exhort[ed] the listener to do anything other than contact the candidate about the described issue." J.S. App. 22a. Appellee's advertisements did exhort their audience to do something else. The advertisements urged listeners and viewers not only to contact Senators Feingold and Kohl directly, but also to visit a website that criticized those Senators for participating in prior judicial filibusters. Only by ignoring that exhortation could the district court conclude that the advertisements did not "reference in any way the Senators' past voting records, current positions, or previous public statements on the judicial filibuster issue." *Id.* at 24a.

Furthermore, the district court's stated concerns about the administrability of a test requiring the deposition of parties (see J.S. App. 18a-19a) are not implicated by judicial consideration of an advertisement's express reference to a website (or related forum). To ascertain the import of the reference, the court—like the listeners or viewers of the advertisement—need only visit the website and review its

contents. Here, a visit to "BeFair.org" would have confirmed that the advertisements were intended to influence a candidate election.

As a core example of the sorts of abuses that BCRA's "electioneering communications" provisions were intended to prevent, the Court in *McConnell* described a hypothetical advertisement that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 127; see p. 31, *supra*. If the advertisements at issue here had included the statement that "Feingold and Kohl are putting politics into the court system, creating gridlock, and costing taxpayers money," J.A. 86, they would have been indistinguishable in principle from the "Jane Doe" hypothetical. Although that statement did not appear in the text of appellee's broadcast advertisements, it did appear in an e-alert posted on the "BeFair.org" website that the advertisements specifically urged listeners and viewers to visit. *Ibid.* A corporation should not be permitted to circumvent BCRA's financing restrictions through the simple device of incorporating by reference statements that could not be made in the text of an advertisement financed with corporate treasury funds.

b. The timing of the advertisements also confirms that they were aimed at influencing the election. Appellee began to run its anti-filibuster broadcast advertisements in July 2004, "days after the last of the judicial filibuster cloture votes had occurred during that session and the Senate had departed for a six-week recess." J.S. App. 43a (Roberts, J., dissenting). Appellee "did not run any additional anti-filibustering ads after the 2004 election in either 2004 or 2005 during the height of the [filibuster] controversy." *Ibid.* Appellee's effort to finance the advertisements was thus limited to the 2004 campaign season, even though public controversy over the filibustering of judicial nominees continued (and indeed

gained greater prominence) during the months following the election. See pp. 11, 13, *supra*.

BCRA's definition of the term "electioneering communication," which is limited to advertisements broadcast during the 30- and 60-day periods before federal primary and general elections, reflects Congress's judgment that the timing of advertisements that mention a federal candidate is an important indicator of the speaker's intent. In discussing the use of purported "issue" advertisements during the pre-BCRA period, this Court in *McConnell* likewise recognized that "the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." 540 U.S. at 127. The district court nevertheless refused to consider what inferences might be drawn from the timing of appellee's advertisements.

In order to rebut the inference of electioneering intent that exists when an advertisement identifying a federal candidate is aired during the 30- or 60-day pre-election window, a corporate advertiser should be required to demonstrate, at the very least, that the timing of its advertisements logically serves a non-electoral purpose. Appellee, however, commenced its advertising campaign at a time when Congress was out of session, and it abandoned its efforts after the election occurred; even though public controversy over the filibustering of judicial nominees reached its height during the spring of 2005. Those facts reinforce, rather than dispel, the conclusion that appellee's advertising campaign was *intended* to coincide with the electoral schedule, and that the pre-election timing was not simply fortuitous.[13]

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[13] Veteran political consultant Douglas L. Bailey (see pp. 31-32 & note 8, *supra*) explained:

[Appellee's] advertising strategy is inconsistent with an advocacy group

The district court's refusal to consider the relevant "timing" evidence was especially misguided because the court stated that it *would* consider whether the 2004 advertisements "describe[] a legislative issue that is either currently the subject of legislative scrutiny or is likely to be the subject of such scrutiny in the near future." J.S. App. 22a. The court thus recognized that the presence or absence of a temporal link between appellee's advertisements and Senate consideration of the judicial-filibuster issue was relevant to the disposition of appellee's as-applied constitutional claim. In determining whether such a link existed, however, the court offered only the conclusory statement that the advertisements "describe an issue that had been, and was likely to be, an ongoing issue of legislative concern in the Senate." *Id.* at 23a. The court made no focused effort to determine whether appellee's advertisements were sensibly timed to achieve their purported objective of influencing legislative debates.

c. The district court also erroneously refused to consider the fact that appellee had frequently and explicitly opposed Senator Feingold's 2004 reelection effort through other com-

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that wished to engage in "grassroots lobbying." [Appellee] did not begin to air its advertisements until a few days *after* several judicial filibusters had happened. Any competent consultant who truly wished to engage in "grassroots lobbying" would have run issue ads in the time leading up to the July filibusters, when the message would not have been obfuscated by the abundance of electioneering ads. Nor would any competent campaign consultant run ads after July 22, 2004, when the Senate left for summer recess.

J.A. 61. Indeed, the employee who generally oversaw appellee's lobbying activities acknowledged that running grassroots lobbying advertisements after the relevant votes have occurred would be "a waste of time." J.A. 29; FEC Exh. 4, at 112. The outside consultant hired for the advertising campaign at issue in this case similarly agreed that such advertisements, to be effective, should run shortly before the legislative vote that is sought to be influenced. FEC Exh. 5, at 30-31; *see* J.A. 29.

munications. See J.S. App. 41a-42a (Roberts, J., dissenting); pp. 8-11, *supra*. "Senator Feingold's participation in judicial filbustering was a particular focus of criticism by [appellee]." J.S. App. 42a (Roberts, J., dissenting). The district court concluded that, unless a particular communication was itself subject to regulation under BCRA, the existence of the communication would have "no bearing" on the resolution of appellee's as-applied constitutional challenge. *Id.* at 23a n.18. Appellee's pattern of electoral advocacy during the 2004 campaign, however, is directly relevant to the question whether the generalization on which BCRA § 203 is based—*i.e.*, Congress's determination that advertisements falling within the BCRA definition of "electioneering communication" will typically reflect an intent to affect electoral outcomes—has been proved to be inaccurate in this case.

Adoption of the district court's approach, moreover, would create substantial opportunities for circumvention of BCRA's financing restrictions on corporate electioneering. A corporation could "prime the pump" by using PAC funds to finance an advertisement that discusses an issue of public concern, denounces a candidate's record on that issue, and calls for the election of his opponent. The corporation could then use treasury funds, perhaps obtained through large donations from business entities, to air an advertisement that is substantially similar but that omits express criticism of the candidate and urges viewers to "contact" rather than "defeat" him. Although viewers' reactions to the second advertisement would predictably be colored by their prior exposure to the first, the district court's approach would treat that prospect as irrelevant to the constitutional analysis.[14]

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[14] Testifying in *McConnell*, one veteran political consultant described a "common trick" that had been used to create "sham issue ads":

> Sometimes, the media consultant for the candidate will shoot the film and

Undoubtedly some corporations are engaged in legitimate issue advocacy designed to urge changes in the law rather than to affect federal elections. And while BCRA's bright-line definition of "electioneering communication" identifies election-related advertising with a high degree of accuracy (particularly given the alternatives available to corporations that do not seek to influence elections), that definition may occasionally capture advertisements that demonstrably lack any electoral purpose or effect. The advertisements at issue in this case, however, clearly do not fit that description. Appellee's as-applied challenge therefore should be rejected, and the Court should leave for another day the difficult task of attempting to define the circumstances, if any, under which corporations can prove a constitutional entitlement to an exemption from BCRA § 203.

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sell it to the media for a reasonable rate. They simply take 2 cameras on a shoot when they are filming the candidate's ad. Camera A shoots the footage for the candidate's ad, and Camera B takes nearly identical footage that is then sold to other media consultants for a nominal fee. The media consultant for the third party just has to buy the film from Camera B and put on a clever tag line at the end.

251 F. Supp. 2d at 535 (Kollar-Kotelly, J.). The record in *McConnell* also included two NRA radio advertisements, one financed with PAC funds and the other with corporate treasury funds. The two were substantively identical except that the PAC advertisement concluded with an electioneering tag line ("Please vote freedom first. Vote George W. Bush for President."), and the other advertisement omitted any magic words of express electoral advocacy. See *id.* at 548-549. Acceptance of the district court's approach would allow similar manipulation on a systematic basis.

CONCLUSION

The judgment of the three-judge district court as to the claims at issue in these appeals should be vacated on the ground of mootness, and the case should be remanded with instructions to dismiss as to those claims. In the alternative, the judgment should be reversed.

Respectfully submitted.

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